APR 9 1992

No. 91-7328

In The

# Supreme Court of the United States

October Term, 1991

LEONEL TORRES HERRERA,

*Petitioner,*

v.

JAMES A. COLLINS, Director, Texas Department of Criminal Justice,

*Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

## JOINT APPENDIX

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**Petition For Writ Of Certiorari Filed February 19, 1992**
**Certiorari Granted February 19, 1992**

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| February 18, 1992 | Order (amending memorandum opinion of February 17, 1992) |
| February 18, 1992 | Order (staying execution, and supplementing Order of February 17, 1992, staying execution) |




IN THE DISTRICT COURT OF
CAMERON COUNTY, TEXAS
197TH JUDICIAL DISTRICT

CAUSE NO. 81-CR-672-C

EX PARTE:
LEONEL TORRES HERRERA,
APPLICANT

AMENDED ORDER ON APPLICATION FOR WRIT OF HABEAS CORPUS

The Defendant in this cause filed his Application for Writ of Habeas Corpus December 12, 1990. The State filed a response December 28, 1990.

On January 2, 1991, the Court entered its order that such Application for Writ of Habeas Corpus be transmitted to the Texas Court of Criminal Appeals for that Court's consideration. T. p. 120.

The State having now filed proposed findings of fact and conclusions of law should be made and entered:

The Order on Application for Writ of Habeas Corpus entered herein January 2, 1991, T. p. 120, is hereby withdrawn and in its stead the Court makes the following Findings of Fact and Conclusions of Law and Order upon the Application of Writ of Habeas Corpus of Leonel Torres Herrera:

FINDINGS OF FACT

1. Applicant, Leonel Torres Herrera was indicted for and convicted for the offense of Capital Murder herein.

After the Jury affirmatively answered the Special Issues the Court assessed punishment at death.

2. Employed trial counsel was James S. Bates. At the time of this trial Bates had been engaged in the practice of law for thirty-two years. A former District Attorney of Hidalgo County, Texas, and State Senator, Bates was a skilled and experienced trial lawyer regularly engaged in the defense in major felony cases throughout South Texas, including ten or more in this Court. Senator Bates has since died.

3. On appeal Applicant's conviction was affirmed. *Herrera v State* 682 S.W. 2d 313 (Tx.Cr.App. 1984) Cert. Den., 471 US 1131 (1985).

4. Appellate counsel by employment was Will Gray, a skilled and experienced lawyer with extensive experience in the appeal of Capital cases.

5. A subsequent Writ of Habeas Corpus authored by Gray was denied by the Court of Criminal Appeals and U.S. District Court, Ricardo Hinojosa, J. The unpublished October 23, 1989, memorandum of Judge Hinojosa is ordered made part of this supplemental transcript.

6. The action of the U.S. District Court was affirmed by the United States Court of Appeals for the Fifth Circuit, June 25, 1990. *Herrera v Collins* 904 Fed. 2d 944 (5th Cir. 1990) cert.den. Oct 15, 1990

7. Attorney Gray represented Appellant in a subsequent trial where Appellant ultimately plead guilty to the murder of the second officer, DPS Trooper Rucker.



8. On direct appeal Applicant urged eight grounds of error, none of them remotely related to or suggestive of the Claims for Relief he now urges.

9. Applicant's first Application for Writ of Habeas Corpus sought relief on the grounds of impermissable identification, erroneous admission of a dying declaration and ineffective assistance of counsel. Nothing there raised was remotely related to or suggestive of the claims for relief he now urges.

Claim I

10. As to jurors Mike Guajardo, Ashton L. Barefoot and Daisy May Hanks: Applicant made no challenge for cause, and indeed, raised no obligation to their being seated as jurors, R.Vol IX pp 101, 137 and 156.

11. Applicant did not challenge Juror Joseph J. Bressler for cause. He made no obligation when the juror was seated, but did ask that he be granted an additional preemptory challenge (having been granted four additional challenges previously) because of the "expressions" and "feelings" of his client. R.Vol IX 120

12. As the indictment was about to be read to the jury, Applicant made his only mention in trial of jurors Guajardo, Barefoot, Hands and Bressler in an oral motion for mistrial. Referring to the four jurors counsel again made no suggestion they were subject to challenge for cause nor request they be removed from the jury saying only "the Defendant personally feels that the selection of (the jurors . . . were (sic) wholly unfair and unjust, as far as he is concerned". The motion then sought a mistrial be

granted so that Applicant be given "enough time to get an attorney acceptable to him and in whom he has faith and confidence". R.Vol XII pp 3 and 4.

13. Petitioner's first claim for relief was never urged in the trial Court (except as set out above) and it was not raised on direct appeal or in his subsequent petition for writ of habeas corpus.

Claim II

14. Applicant's claim that Juror Bressler was armed while on jury duty, or made statement contradictory to one made by him on voir dire, is premised solely upon an affidavit of hearsay by an employee of Applicant's present counsel.

15. Nothing at the trial or in its record remotely suggests that Applicant's second claim has any basis in fact.

16. Claim II was never raised in the trial Court, urged on direct appeal or thereafter.

Claim III

17. At trial Applicant did not take the stand and there was no evidence offered concerning the Applicant personally, past or present mental or physical health, life history, military service, childhood substances, criminal record or employment. Indeed the record is bereft of even so much as his age.

18. Applicant elected to offer no evidence at trial "which counselled in favor of a sentence less than death". The entirety of his evidence was showing of the absence



of fingerprints on the involved vehicle and post arrest injuries sustained by him in a scuffle with officers after he struck an Assistant District Attorney.

19. The "*Penry*" type mitigation evidence" expounded upon at length in this petition was not proferred at trial. No attempt is made now to explain why trial counsel elected not to do so at a trial two years after the *Penry* claim was preserved in 1980. See *King v Lynaugh*, 868 F 2d 1400, 1403 (5th Cir.1989)

20. At trial Applicant made no objection to the Charge on Punishment as given, nor did he request additional or different instructions. No explanation is offered now to explain why trial counsel elected not to do so at a trial two years after counsel preserved the *Penry* claim in 1980. See *King supra*.

21. Applicant made no objection to the Sentencing Procedure of Art. 37.07 C.C.P. as having an "unconstitutionally preclusive effect", or that it precluded the jury's consideration of mitigating evidence offered as the basis for a sentence less than death, or that it failed to guide the jury in its consideration of mitigating evidence. Neither did he urge these contentions on direct appeal in 1984 or in a subsequent petition for writ of habeas corpus in 1985 long after the *Penry* and *Franklin* claims were preserved in 1980 and 1982 respectively.

22. Applicant did not object at trial that the Court's punishment charge did not included "mitigation instructions", failed to adequately inform the jury of the consequences of their answer, or that it did not define certain depositive terms not defined by Texas statute. Neither did he urge these deficiencies on appeal or afterwards.

23. The bottom line is that Applicant's third claim *en toto* is here raised for the first time in his second petition for a writ of habeas corpus and without good cause explanation why it was not urged at trial, on direct appeal, or in his subsequent petition for writ of habeas corpus throughout the years 1982-1989.

## Claim IV

24. As voir dire was being completed the Defendant suddenly stood and shouted: "I do not consider this a trial. I consider this a lynching party. That is the way I feel." Told by the Court he must not disrupt the trial, the Defendant replied "I already have". At this point the Court had the Defendant moved into a "cry room" opening into the courtroom but separated by a large glass window where occupants can see and hear all courtroom proceedings but cannot be heard in the courtroom. R Vol X pp 61.

25. Applicant remained in the observation room for about fifteen to twenty minutes until the noon recess. The proceedings had while he was in the observation room are set out at R. Vol X pp61-65.

26. When Court reconvened after lunch Applicant was back at the counsel table and remained throughout the trial. On his return the Court admonished him it would not allow the Court to be disrupted, and if he attempted to stand or speak, he would again be returned to the observation room.

27. Applicant understood the Court's prohibition was to disruptive outbursts, as evidenced by the fact that he



freely conversed with his counsel and guards throughout the trial and never appeared inhibited by the Court's choice of words.

28. Applicant made no objection at trial to the Court removing him to the observation room nor to the Court's instructions upon his return, nor did he raised this matter on direct appeal or otherwise until now.

## CLAIM V

29. Closing arguments were not reported. No request was made that they be reported and no objection made that they were not being reported. R.Vol XII p. 12

30. No objection were made nor instructions requested as to closing arguments.

31. Applicant's imaginative errors he speculates may have been in the prosecutor's closing arguments are here raised for the first time.

## CLAIMS VI AND VII

32. Applicant made no objection at trial to the State's questions and remarks in voir dire that he now finds improper.

33. Applicant made no request the Court otherwise instruct the jury or strike the State's reference to "life subject to the rules of pardons and parole".

34. The claimed errors in the prosecutor's voir dire questions and remarks are here raised for the first time in his second petition for writ of habeas corpus.

## CLAIM VIII

35. There was no evidence at trial remotely suggesting that anyone other that Applicant committed the offense. Judge Campbell observed: " . . . we find all other evidence of appellate's identification as the perpretrator of the offense to be overwhelming". *Herrera v State*, 682 SW 2d 313, 320.

36. At a subsequent trial for the murder of the second officer, after Applicant stated in open Court that he had killed DPS Trooper Rucker, he answered that he was the driver of the automobile stopped by Patrolman Carrizales, which action of Carrizales cost him his life at the hands of such driver seconds later.

## CONCLUSIONS OF LAW

1. There are no previously unresolved issues of fact material to the legality of Applicant's conviction and execution. Therefore an evidentiary hearing is necessary.

2. Applicant is procedurally barred from asserting error to the inclusion if Guarjardo, Barefoot, Hanks and Bressler on his jury having made no challenge for cause or valid objection to them at trial, made no such complaint on direct appeal and is now urges [sic] this ground of relief for the first time in a second petition for writ of habeas corpus.

3. Applicant's second claim as to "newly discovered evidence" of juror misconduct premised, as it is, entirely on the supposed truth of hearsay is without merit.



4. Applicant elected to offer no "mitigation" evidence at trial. He was not precluded from presenting such evidence nor was the jury precluded from giving consideration to it.

5. Because Applicant failed to offer any *Penry* type "mitigation evidence" at trial he is procedurally barred from here urging his Claim III.

6. Because Applicant did not object to the charge on punishment or request any additional instructions at trial and did not complain on direct appeal, Applicant is procedurally barred from now for the first time complaining that such charge failed to include certain instructions concerning mitigation evidence; failed to adequately inform the jury concerning the consequences of "Yes" and "No" answer to the special issues; and did not include definitions of certain terms.

7. Having lodged no obligation to the sentencing procedures at the time of trial, on direct appeal; or in his first writ petition, Applicant is procedurally barred from complaining that the sentencing procedure of Art. 37.071 is unconstitutional as precluding the jury's consideration of mitigating evidence.

8. Applicant is procedurally barred from asserting his perceived error in the Court's temporarily placing Defendant in an observation booth, and afterwards admonishing him, not having made objection at trial and failing to urge this complaint on direct appeal or thereafter.

9. Applicant is procedurally barred from now complaining of imagined errors in argument after failing to object at trial or to seek review on direct appeal or thereafter.

10. Applicant is procedurally barred from asserting errors as to prosecutor's voir dire questions and remarks when Applicant made no objection at trial and failed to urge such a claim on direct appeal or thereafter.

11. Applicant's "newly discovered evidence" as to the guilt of another based solely on hearsay is without merit.

12. Applicant has failed to demonstrate that his conviction was improperly obtained; but, he has affirmatively demonstrated, and this Court expressly finds, he is procedurally barred from advancing his present eight claims. Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied.

The Clerk is ordered to prepare a Supplemental Transcript containing this Order, proposed findings of fact and conclusions of law filed herein, the October 23, 1990, Memorandum of U.S. District Judge Hinojosa, and any other supplemental filings herein. the Clerk will deliver the Supplemental Transcript to the Court of Criminal Appeals as provided by Art. 11.07 of the Texas Code of Criminal Procedure.

Signed the 14th day of January, 1991.

/s/ Illegible
Judge Presiding

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IN THE TEXAS COURT OF CRIMINAL APPEALS

TC-91-21-179

EX PARTE LEONEL TORRES HERRERA

NO. 71.171 Habeas Corpus Application
From CAMERON County

OPINION

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.07, V.A.C.C.P.

On January 20, 1982, applicant was found guilty of the offense of capital murder. After the jury returned affirmative answers to the special issues, punishment was assessed at death. This Court affirmed applicant's conviction on direct appeal. Herrera v. State, 682 S.W.2d 313 (Tex. Cr. App. 1984).

On January 17, 1991, this Court ordered the instant cause filed and set on applicant's third allegation. In that allegation, it is urged the jury in applicant's capital murder trial was precluded from considering evidence which "counseled in favor" of a sentence less than death, in violation of applicant's Sixth, Eighth and Fourteenth Amendment rights. The trial court has entered findings of fact and conclusions of law and recommended the relief sought be denied.

This Court has reviewed the record with respect to the allegation presented by applicant and finds that the findings and conclusions entered by the trial court are

supported by the record and upon such basis the relief sought is denied.[1]

PER CURIAM

Delivered: May 29, 1991
En banc

DISSENTING OPINION

The evidence listed in the application for writ of habeas corpus is evidence that would have been harmful to the defendant if offered at trial without instructing the jury that it could consider and give effect to mitigating evidence by declining to impose the death penalty. A request for such an instruction would have been futile at the time this case was tried. *See* Stewart v. State, 686 S.W.2d 118 (Tex.Cr.App. 1984).

I do not believe that counsel was incompetent because he did not proffer the evidence listed in the application at the time of trial. Strickland v. Washington, 466 U.S. 648, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The machinery in place at the time of this trial militated that competent counsel not proffer "two edged sword" *Penry* type evidence since it conceivably might have been utilized by the State; but without directions to the jury in accordance with the instruction mentioned above. Penry

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[1] We specifically decline to adopt conclusion of law No. 6 entered by the trial court concerning applicant's alleged procedural default. See Black v. State, ___ S.W.2d ___ (Tex.Cr.App. No. 69,648, delivered this day). Applicant's remaining seven allegations are denied on the basis of the findings are conclusions entered by the trial court.



v. Lynaugh, 492 U.S. ___, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

The Texas scheme of submitting the statutory issues to the jury on whether the defendant should receive death under Article 37.071, V.A.C.C.P., has never provided and still does not provide a mechanism for the jury to consider *Penry* type evidence in mitigation of the death penalty (evidence that goes beyond the scope of the statutory issues); an issue that would allow the jury to make an individualized assessment of the defendant and a "reasoned moral response" about the appropriateness of the death penalty where such evidence exists.

Until today, neither this Court nor the legislature has required that the trial courts of this State submit such an issue, despite the warnings, albeit sometimes clouded, suggested by Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1975); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 Whether any or all of these categories reflect true *Penry* evidence is a question we need not address here, although unquestionably at least some of them do. For in any event, by my reading of the trial record, none of these categories is substantiated by evidence sufficient to invoke a reasoned moral response of leniency. In short, I do not believe evidence was presented having mitigating significance beyond the Article 37.071(b), V.A.C.C.P., special issues. Thus I cannot conclude that applicant has been sentenced to death in contravention of the Eighth Amendment. See Gribble v. State, ___ S.W.2d ___ (No. 70, 773, delivered November 14, 1990) (Slip op. at 17).

However, applicant also claims that the Texas capital sentencing scheme prevented him from adducing substantial mitigating evidence. In the course of argument he drops a footnote in which he somewhat tentatively advances a Sixth Amendment ineffective assistance of counsel claim for failure of counsel to investigate and develop this evidence at applicant's trial. In an appendix to his writ application he documents what seems to me evidence of substantial mitigating potential that could have been tendered at the time of trial but was not. This evidence takes two forms: (1) affidavits of members of applicant's family documenting his history of abuse, his mental instability and his drug addiction; and (2) a psychologist's report. There is also an affidavit from applicant's only surviving trial counsel explaining why this evidence was not sought out at the time of trial.

**Family Affidavits**

There are affidavits from applicant's mother, his sister-in-law, his common-law wife, and two sisters. In synthesis, they tell the following grim story.

Applicant's father was a violent alcoholic who regularly beat applicant's mother "black and blue." When she was pregnant with applicant, he was known to have kicked her in the stomach. Applicant was an asthmatic child who suffered from scarlet fever and chronic headaches. Unable to afford a doctor, applicant's mother treated him with home remedies. Applicant would try to protect his mother from his father's abusive outbursts, and would endure beatings from his father as a consequence, often punched mercilessly about the head and



face. Applicant excelled in sports, but had a tendency to suffer head injuries. Once he was accidentally knocked unconscious with a baseball bat.

Applicant dropped out of high school and joined the Navy in 1967. He spent the next two years on a ship somewhere off the coast of Vietnam, and purportedly "saw combat." He was clearly traumatized by his experience, but would not talk about it to others, at least "not in any kind of way that [people] could understand." He returned from Vietnam a changed and paranoid man, "and if you asked him about who might come after him, all he would tell you was that it was the people who had seen what happened during the war." He sometimes lapsed into a glassy-eyed trance-like state, and would talk nonsense until he could be brought out of it.

After Vietnam, applicant took a common-law wife and started a family. At first he was a "loyal" family man. He and his brother started a business together running a convenience store. But when one of his daughters was born prematurely and spent a month in the hospital, with expenses mounting up, applicant became depressed.

Meanwhile applicant's father was in an auto accident and recovered "a tremendous amount of money" in a lawsuit. His drug of choice had changed from alcohol to cocaine, and he "used the money to buy a portion of the drug trade in Hidalgo County." Applicant and his brother were induced with free cocaine to join their father's enterprise, and their own business failed. Applicant became heavily dependent, and from about mid-1980 on he began to live for cocaine. He lost 40 pounds, his face turned gray, and his nose would "pour blood" at a mere

touch. His paranoia increased. He believed his wife was trying to poison him, and began to live in his car. At one point he proclaimed that "green things were coming down from trees and . . . they were after him." On the day of the offense applicant's sister "could tell he had a lot of drugs in him."

**Psychologist's Report**

After interviewing applicant in TDC, conducting a battery of psychological tests, and reviewing the same affidavits as those summarized above, Dr. Brad Fisher, a specialist in forensic clinical psychology, drew the following conclusions:

Leonel Herrera is a 43 year Mexican-American male currently presiding [sic] on Death Row, having resided there since 1982. It is the opinion of this evaluator that this individual suffers from neurological dysfunction, combined with (but not totally separate from) the presence of [Post Traumatic Stress Disorder]. It is probable that these conditions are chronic in the sense that they have existed at least since his experience in Vietnam, and in the case of the neurological handicaps, possibly since a much earlier age. Evidence for these dysfunctions is presented consistently from test data, behavioral observations, and the information available to this examiner for review.

A person who suffers from brain damage does not necessarily have sub-average intellectual functioning. However, such an individual is likely to have inherent limitations in judgment and impulse control.



A person who suffers from PTSD suffers from serious and severe limitations on cognitive functioning, judgment, insight, and perception. All facets of the sufferer's life are affected by this disorder, as he or she frequently cannot reason adequately, perceive reality normally, or respond to situations adequately.

Someone with brain damage, who also suffers from PTSD, is predisposed to substance abuse. A person who suffers from brain damage, PTSD, and substance abuse may deliberately commit a crime, and be violent in the future. However, such a person's culpability is seriously diminished where these conditions occur. This was Mr. Herrera's condition in the fall of 1981.

Thus, we have not only raw data from which a finding of diminished responsibility could be made in this cause – we also have an expert opinion that the raw data does in fact support such a finding in his professional opinion. This would provide a solid base for a jury, in its reasoned moral judgment, to impose a sentence less than death.

**Counsel's Affidavit**

Applicant's lead counsel at trial has since died. The writ application contains an affidavit from his second chair, Jose Antonio Gomez, who "was not present during voir dire, but entered an appearance after voir dire was completed." His affidavit reads, in relevant part:

> "This was the first capital case in which I had been involved. Naturally I read and researched the Texas death penalty statute. From my understanding of the statute and the

facts of the case, the jurors in Mr. Herrera's case, when deciding the sentence, were to determine only a.) whether the offense was deliberate, and b.) whether there was a possibility that Mr. Herrera would be dangerous in the future. If the jurors answered these questions affirmatively, then the penalty would be death.

"Neither [lead counsel] nor I conducted any investigation into Mr. Herrera's background. We did not have Mr. Herrera evaluated by any mental health expert. We knew that Mr. Herrera was addicted to controlled substances at the time of the offense, we knew there was a possibility that he suffered from brain damage, and we believed that he was under the influence of controlled substances at the time of the offense. We believed, however, that evidence of those conditions would support an affirmative answer to the only two questions that the jury would be allowed to consider and required to answer. While such evidence could provide a compelling basis for a sentence less than death, the statute, as we read it, allowed juror consideration of such evidence only as it related to their answers to two questions, deliberateness and future dangerousness. We would have helped prove the State's case by presenting such evidence, and such evidence could not have been considered independently as providing a basis for a sentence less than death. Because of these restrictions, no such evidence was investigated or presented."

It seems to me this affidavit is susceptible to two interpretations. Counsel could be saying that he and co-counsel were simply unaware of the Eighth Amendment principles that eventually led to the holding in *Penry*, and



failed to investigate mitigating evidence for the simple reason that they believed it to be irrelevant under the statutory scheme. In this event the ineffective counsel claim seems to be established, for there is compelling evidence of mitigation that for no valid reason counsel failed to investigate. E.g., Jones v. Thigpen, 788 F.2d 1101 (CA5 1986); Blake v. Kemp, 758 F.2d 523 (CA11 1985). Alternatively, counsel could be saying they were aware of precedent from this Court holding that an additional instruction regarding uses of mitigating evidence was unwarranted, and believed that to present mitigating evidence and ask the trial court for an instruction would have been futile, and only deleterious to applicant's cause at the trial level. In this event the failure to investigate and present viable mitigating evidence could be viewed as a tactical decision. The Fifth Circuit has ruled that a tactical decision to forego admitting mitigating evidence will not support an Eighth Amendment *Penry* claim, *per se*. See May v. Collins, 904 F.2d 228 (CA5 1990); DeLuna v. Lynaugh, 890 F.2d 720 (CA5 1990). A tactical decision not to investigate or present mitigating evidence may be said to foreclose an ineffectiveness claim under the Sixth Amendment as well. E.g., Middleton v. Dugger, 849 F.2d 491, at 493-4 (CA11 1988).

But I am inclined to believe that a capital accused who can show that *Penry* evidence existed and could have been presented at his trial should be entitled to relief even if his counsel made a conscious decision not to investigate or adduce that evidence at the time of trial. because of this Court's reliance upon the false assurances of Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), that our statute was constitutional as is, even

after Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and its progeny cast a pall upon it, applicant's counsel was put in an intolerable position.

It would be hard to blame counsel if he had decided not to investigate mitigating evidence under the circumstances. There would have been no way for him to assure in advance of trial that the trial court would give the jury an instruction to consider mitigating evidence apart from its relevance to special issues, and make a reasoned moral judgment whether applicant should live or die. Given this Court's pre-*Penry* cases, and the fact that Article 37.071, V.A.C.C.P., does not seem to permit, much less authorize, such an instruction, the chances of his getting it would have been slim to none. Without the instruction, counsel could only hurt applicant's cause by presenting the "mitigating" evidence outlined above. For, although it makes a strong case for a finding of diminished responsibility, applicant's evidence also tends strongly to show he will be a future danger to society. If counsel made a "tactical" decision not to seek and present mitigating evidence, he was forced into that "Hobson's Choice" by Article 37.071, supra, and this Court's adherence to *Jurek* even after the *Lockett* writing was on the wall. See Stewart v. State, 686 S.W.2d 118 (Tex.Cr.App. 1984) (Clinton, J., dissenting). We should not now deny a Sixth Amendment ineffective counsel claim because of a court-induced "tactical" decision to avoid helping the State satisfy its burden of proof. See *May v. Collins*, supra, at 232-34 (Reavley, J., concurring).

In my view we should sustain applicant's Sixth Amendment ineffective assistance of counsel claim. If the Court disagrees that such a claim can be sustained



despite a "tactical" decision not to investigate mitigating evidence here, then we should at least remand for an evidentiary hearing to determine whether counsel's decision was in fact a tactical one, or was simply an oversight resulting from his failure to comprehend the Eighth Amendment principles involved. For if counsel failed to investigate out of pure ignorance, surely he was ineffective. E.g., *Middleton v. Dugger*, supra. Given the nature of the *Penry* evidence here, I believe there is a "reasonable probability" – that is to say, "a probability sufficient to undermine confidence in the outcome" – that the jury might have found in its reasoned moral judgment that applicant deserved a sentence less than death. Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, at 2068, 80 L.Ed.2d 674, at 698 (1984). Moreover, if the Court chooses to remand for an evidentiary hearing, proposed findings of fact can be made by the habeas court bearing specifically on applicant's Sixth Amendment ineffective counsel claim – something that was not done before we filed and set the cause for submission.

The Court should either grant relief in this cause on the basis of a denial of applicant's Sixth Amendment right to effective assistance of counsel, or, failing that, remand the cause for an evidentiary hearing on the question of why counsel failed to pursue an investigation into mitigating evidence, and require specific fact finding from the habeas court on the Sixth Amendment issue. The

Court takes neither of these courses, and because it does not, I respectfully dissent.

CLINTON, Judge

(Delivered: May 29, 1991)
EN BANC
PUBLISH

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DISSENTING OPINION

This post-conviction application for writ of habeas corpus was filed and set so that the Court could hear argument on the question whether, and if so, under what circumstances, a claim under Penry v. Lynaugh, 492 U.S. ___, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), can be procedurally defaulted for purposes of state review. A majority of the Court has since held that for any cause that was tried before the date of decision in *Penry*, any forfeiture from a failure to object or otherwise raise the issue in the trial court will be excused. Black v. State, ___ S.W.2d ___ (Tex.Cr.App., No. 69,648, delivered this day) (Campbell, J., concurring). This is because before that date a *Penry* claim was a "right not recognized" in this Court. Ex parte Chambers, 688 S.W.2d 483 (Tex.Cr.App. 1984) (Campbell, J., concurring). Applicant Herrera's trial was in January of 1982, seven years before the United States Supreme Court's decision in *Penry*. Nevertheless, the Court holds that applicant's application was improvidently filed and set. We know from *Black* that it cannot have been improvident because of a procedural bar. See also Selvage v.



Collins, ___ S.W.2d ___, (Tex.Cr.App., No. 71,024, delivered this day) (Opinion on Certified Question from the United States Court of Appeals for the Fifth Circuit). I presume, then, that the majority rejects applicant's *Penry* claims on the merits.

Applicant was convicted of the murder of a police officer. See Herrera v. State, 682 S.W.2d 313 (Tex.Cr.App. 1984). He now identifies six categories of mitigating evidence he claims have support in the record of his capital murder trial. Those categories are:

(1) his military service and record;

(2) his history of drug abuse and addiction;

(3) his mental instability;

(4) that he has a caring and loving family that wants him to live;

(5) police brutality after his arrest (the idea being that because he has already suffered some punishment for his crime, a reasonable jury could feel the death penalty to be unwarranted);

(6) his remorse.

L.Ed.2d 973 (1978); Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Penry, *supra*. Cf., Adams v. State, 577 S.W.2d 717 (Tex.Cr.App. 1979); Quinones v. State, 592 S.W.2d 933 (Tex.Cr.App. 1980); Lackey v. State, 638 S.W.2d 439, (Tex.Cr.App. 1982); Stewart v. State, *supra*. *See also* Gribble v. State, ___ S.W.2d ___, (Tex.Cr.App. 1990).

We have decided today that in the trials occurring before *Penry*, there is no procedural default in having failed to request, at the time of trial, a jury instruction on the *Penry* mitigation issue. Black v. State, ___ S.W.2d ___ (Tex.Cr.App. No. 69,648). *See also* Selvage v. Collins, ___ S.W.2d ___ (Tex.Cr.App. No. 71,024) (Opinion on Certified Question from the United States Court of Appeals for the Fifth Circuit). In Lackey v. State, ___ S.W.2d ___ (Tex.Cr.App. No. 69,144) also decided today, although without unanimity and completeness, we attempt to define *Penry* type evidence. In Ex Parte Goodman, ___ S.W.2d ___ (Tex.Cr.App. No. 70,887), we held today that, because it implies a violation of the Eighth and Fourteenth Amendments, the failure to properly instruct the jury on *Penry* type evidence may be cognizable by way of post conviction writ of habeas corpus under Article 11.07, V.A.C.C.P., despite applicant's failure to complain on direct appeal. However, it was mentioned, "absent a contemporaneous offer of proof or bill of exception detailing what mitigating evidence was tactically withheld by the appellant during trial, we will not be heard to consider the same now." *See* Goodman at p. ___, n. 6.

Where this court and the legislature have heretofore failed to give direction, we cannot fault the bar for failing to perfect error or proffer evidence; and this is particularly true since neither we nor the Supreme Court of the United States have yet to fully define the extent, boundaries and limitations of *Penry* type evidence.

I would remand this case for an evidentiary hearing so that the applicant might be allowed to develop his *Penry* type evidence and so that it might be determined if in fact the evidence is that which should have been



submitted to the jury with a proper instruction in accordance with the mandates of Penry v. Lynaugh, *supra*. Because the majority does not do so, I respectfully dissent.

MALONEY, J.

Delivered: May 29, 1991

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

| | | |
|---|---|---|
| LEONEL TORRES HERRERA, Petitioner | ) | |
| VS. | ) | CIVIL ACTION NUMBER |
| JAMES A COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, Respondent | ) | M-92-30 |

MEMORANDUM

Came on to be considered before the Court the Petition for Writ of Habeas Corpus filed by Petitioner, Leonel Torres Herrera (hereinafter "Petitioner") pursuant to Title 28 U.S.C. § 2254, in which relief is sought from a finding of guilty and a sentence of death entered by the 197th Judicial District Court of Cameron County, Texas. Respondent, James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, filed "Respondent's Opposition to Request for Stay of Execution, Motion to Dismiss Pursuant to Rule 9(b) and Alternatively Motion for Summary Judgment and Supporting Brief."

Having considered the pleadings on file, the Court issues the following ruling on the Petition for Writ of Habeas Corpus and the Respondent's responses.



## PROCEDURAL HISTORY

The Petitioner attacks a judgment of the 197th District Court of Cameron County, Texas, dated January 21, 1982, wherein he was convicted of capital murder by a jury and sentenced to death. Petitioner's conviction and death sentence were affirmed by the Texas Court of Criminal Appeals. *Herrera v. State*, S.W.2d 313 (Tex. Crim. App. 1984) (*en banc*). Rehearing was denied by the Court of Criminal Appeals without written order on January 16, 1985. The United States Supreme Court denied *certiorari*. *Herrera v. Texas*, 471 U.S. 1131 (1985). Petitioner filed a Petition for Writ of Habeas Corpus in the 197th District Court of Cameron County, Texas, which entered an order recommending denial of the Writ. The Texas Court of Criminal Appeals denied Petitioner's state writ application. *Ex Parte Herrera*, No. 12848-02 (Tex. Crim. App. August 2, 1985).

A Petition for Writ of Habeas Corpus was then filed with this Court on August 7, 1985 and was subsequently denied. Petitioner filed Notice of Appeal and this Court granted a Certificate of Probable Cause. The Fifth Circuit Court of Appeals affirmed this Court's Judgment. *Herrera v. Collins*, 904 F.2d 944 (5th Cir. 1990). A petition for Writ of Certiorari to the United States Supreme Court was denied. *Herrera v. Collins*, ___ U.S. ___, 111 S.Ct. 307 (1990).

The Petitioner subsequently filed a habeas corpus application in the state trial court. The state trial court entered findings of fact and conclusions of law on February 14, 1991 and recommended that the writ be denied. The Petitioner's writ application was transmitted to the

Texas Court of Criminal Appeals which denied all requested relief on the basis of the trial court's findings except one (declining to adopt the trial court's findings of procedural default on Petitioner's claim that the jury could not give effect to the punishment phase evidence) and vacated the stay of execution. *Ex parte Herrera*, 819 S.W. 2d 528 (Tex. Crim. App. 1991) (Clinton and Maloney, J.J., dissenting). The Petitioner sought rehearing which was subsequently denied. The Petitioner has, on December 17, 1991, filed a Petition for Writ of Certiorari to the United States Supreme Court and a Request for Stay of Execution on February 12, 1991, which are still pending. The state trial court has scheduled the Petitioner's execution for Wednesday, February 19, 1992.

Petitioner filed the instant Petition for Writ of Habeas Corpus with this Court on Sunday, February 16, 1992.

The Petition, which is the Petitioner's second federal habeas Petition, raises five claims for relief pursuant to Title 28 U.S.C. § 2254 as follows:

1. The State's failure to reveal exculpatory evidence resulted in the conviction and sentence of an innocent person, in violation of the Sixth, Eighth, and Fourteenth Amendments. Petitioner is innocent, another person has confessed to the crime, and the Petitioner's execution would violate the Eighth and Fourteenth Amendments.

2. Petitioner was tried and sentenced to death for the murder of two police officers by a jury whose members included a police officer detective in an office that investigated the case, in violation of the Petitioner's Sixth, Eighth, and Fourteenth Amendment rights.



3. During trial, recesses, and juror deliberations, juror-police officer Bressler was armed, and at least one juror noticed; in addition, and contrary to his sworn statements during voir dire, this officer knew one of the victims. These facts reveal that Petitioner's conviction and death sentence occurred in violation of his Sixth, Eighth, and Fourteenth Amendment rights.

4. Petitioner's sentencer's were precluded from considering evidence which counseled in favor of a sentence less than death, in violation of Petitioner's Sixth, Eighth, and Fourteenth Amendment rights.

5. The trial judge wrongfully refused to allow Petitioner to speak at all during Petitioner's trail and capital sentencing proceeding, thereby violating Petitioner's federal Constitutional rights.

Respondent, as previously stated, has responded to the claims for relief of Petitioner and in addition has filed a Motion to Dismiss pursuant to Rule 9(b) alleging abuse of writ and Motion for Summary Judgment.

## FACTUAL BACKGROUND

The evidence at the trial revealed that on the evening of September 29, 1981, a Texas Department of Public Safety Officer, David Rucker (hereinafter "Rucker") was killed by a gunshot wound to the head. There were no witnesses to the shooting, but Petitioner's social security

card was found near the body. Ten minutes later, approximately six miles from where Rucker's body was found, Enrique Carrisalez (hereinafter "Carrisalez") a Los Fresnos, Texas, city police officer, stopped a speeder travelling from the direction of the earlier shooting. As Carrisalez approached the stopped vehicle, the driver shot him in the chest. The officer died nine days later from the wound.

Carrisalez was accompanied by civilian Enrique Hernandez (hereinafter "Hernandez") who witnessed the shooting. Upon attempting to stop the vehicle, Carrisalez called in the license plate number of the car on the police radio. After the shooting, Hernandez radioed in a general description of the suspect's automobile. Immediately afterwards that night, Hernandez was interviewed by police officers.

On the next morning, Hernandez gave a statement to Texas Ranger Bruce Casteel. The police then proceeded to obtain an arrest warrant. On the morning of September 30, just hours after the shooting had occurred, Hernandez was called to the Harlingen police station and shown a display of photographs. From that display, he chose three photographs, one of which portrayed the Petitioner. The following afternoon, October 1, two police officers went to the hospital room of Carrisalez, showed him a single photograph of Petitioner, and asked him three times if he could identify it. Although he could not speak, Carrisalez nodded his head positively identifying Petitioner as the gunman. This same photograph was shown by itself to Hernandez later the same day, who also made a positive identification of Petitioner. The photograph was a mug



shot that carried the notation "Edinburg Police Department" suggesting the person was already in custody.

Hernandez was shown another photographic display on October 6, 1981, two days after Petitioner had been taken into custody. At this showing, he positively identified Petitioner. Finally, on October 24, Hernandez identified Petitioner from a five-man lineup attended by Petitioner's attorney.

Petitioner was arrested on October 4, 1981, and he was taken to the station for questioning. Following the arrest, police searched the Petitioner and found a letter written on the backs of several envelopes, wherein Petitioner discussed the death of both officers. After having been convicted of the capital murder of Carrisalez, Petitioner plead guilty to the murder of Rucker.

Petitioner in the present Petition, claims he is innocent of the murder of both officers and that his brother, Raul Torres, was the one who committed the murders and has offered several affidavits, including one of an alleged eyewitness, in support of his claim of innocence.

RESPONDENT'S MOTION TO DISMISS UNDER RULE 9(b)

Respondent moves to dismiss this case under Rule 9(b) of the Rules Governing Section 2254 cases in the United States District Court, which provides:

> A second of successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds

> that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

The abuse of writ doctrine generally "prohibits subsequent habeas consideration of claims not raised, and thus defaulted, in the first federal habeas proceeding." *McCleskey v. Zant*, ___ U.S. ___, 111 S.Ct. 1454, 1470, No. 89-7024 (April 16, 1991). In *McCleskey*, The Supreme Court applied the procedural default standard to abuse of writ inquiries in the following manner:

> When a prisoner files a second or subsequent application, the government bears the burden of pleading abuse of the writ. The government satisfies this burden if, with clarity and particularity, it notes petitioner's prior writ history, identifies the claims that appeal for the first time and alleges that petitioner has abused the writ. The burden to disprove abuse then becomes petitioner's. To excuse his failure to raise the claim earlier, he must show cause for failing to raise it and prejudice therefrom as those concepts have been defined in our procedural default decision.
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> Federal courts retain the authority to issue the writ of habeas corpus in a further narrow class of cases despite a petitioner's failure to show cause for a procedural default. These are extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime. We have described this class of cases as implicating a fundamental miscarriage of justice.



111 S.Ct. at 1470 citing *Murray v. Carrier*, 477 U.S. 478, 485, 106 S.Ct. 2639, 2643 (1986).

Respondent's pleadings sufficiently satisfy the burden imposed in order to plead abuse of writ. The burden shifts and Petitioner must meet the *McCleskey* standards in order to urge the five claims for relief now alleged. Guided by *McCleskey*, this Court must consider all of Petitioner's present claims under the procedural default standard. 111 S.Ct. at 1470.

Because the Court will address the abuse of writ and/or procedural default issues with regards to each one of the five claims for relief, the Court will proceed to discuss each claim below.

## CLAIM I

THE STATE'S FAILURE TO REVEAL EXCULPATORY EVIDENCE RESULTED IN THE CONVICTION AND SENTENCE OF AN INNOCENT PERSON, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. PETITIONER IS INNOCENT, ANOTHER PERSON HAS CONFESSED TO THE CRIME, AND THE PETITIONER'S EXECUTION WOULD VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS

In his first claim, the Petitioner presents allegations that maintain his actual innocence of the capital murder convictions. The petitioner frames part of this claim as a violation of the constitutional principles enunciated in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Petitioner alleges, without proof of any evidence, that law enforcement officials knew of exculpatory evidence and withheld it from defense counsel at trial

and sentencing. In the alternative he alleges he is innocent of the crime and his execution would violate the eighth and fourteenth amendments and an evidentiary hearing on this claim of innocence must be a full and fair one.

The petitioner alleges he was not present when either of the two officers was killed. Petitioner avers he had nothing to do with either murder. To substantiate the claim, the Petitioner offers four affidavits. Affiant Hector J. Villarreal represented the Petitioner's brother Raul Herrera, on a charge of attempted murder. According to Villarreal, Raul Herrera confessed to him that he, not Petitioner, murdered both Rucker and Carrisalez. Villarreal states that Raul Herrera was murdered in 1984. (See Appendix to Petition, No. 10).

Affiant Juan Franco Palacios states that he was a friend of Raul Herrera. Palacios states that on one occasion, when sharing a cell at the Hidalgo County Jail in 1984, Raul Herrera confessed that he murdered Rucker and Carrisalez. (See Appendix to Petition, No. 11). Affiant Jose Ybarra, Jr., an old schoolmate of the Herrera brothers relates a similar confession. (See Appendix to Petition, No. 15). The most recent of the above mentioned affidavits was executed over a year ago and it appears that the Villarreal and Palacios affidavits were presented to the state trial court.

Raul Herrera's son, Raul Herrera, Jr., relates an eyewitness account of the murders in an affidavit executed within the last two weeks. (See Appendix to Petition, No. 16). Raul Herrera, Jr. states he was with his father on the date of the murders and that his father killed both Rucker



and Carrisalez. Affiant Raul Herrera, Jr. states that the Petitioner was not involved and was not present when the murders occurred. This affiant states that he told a police officer this account, but the officer told him never to repeat it. The affiant states no attorney representing the Petitioner asked him about the events until recently.

Although the state trial court considered a claim of newly discovered exculpatory evidence in the Villarreal and Palacios affidavits, the Petitioner complains the trail court summarily dismissed them without a hearing as being meritless. The Petitioner argues he was entitled to an evidentiary hearing by the trial court on this matter and is especially so entitled in light of the latest affidavits. However, as already stated, two of the affidavits including the recent alleged eyewitness one have never been presented to the state trial court.

Although one of the Petitioner's complaints under this claim is as a constitutional *Brady* violation, the Petitioner fails to adequately demonstrate any evidence of withholding exculpatory material by the prosecution. To state a *Brady* claim, the Petitioner must demonstrate that "(1) The prosecution suppressed evidence that was (2) favorable to the accused and (3) 'material to either guilt or punishment.' " *Cordova v. Collins*, ___F.2d___, No. 92-2037, (5th Cir. 1992) citing *Brady*, 373 U.S. at 87. The affidavits offered as 'new evidence' as well as the newspaper articles to which Petitioner refers in this Appendix fail to make any showing that the prosecution even knew about this evidence. The affidavits come from people closely associated with the Petitioner or his brother. The Petitioner has failed to show the first prong of a *Brady* claim and thus no constitutional violation under *Brady*.

Since this allegation contains evidence which was acquired after the first federal habeas petition in 1985 this Court will not use the abuse of writ standard but will grant the Respondent's Summary Judgment Motion on this issue.

With regard to the second portion of Petitioner's claim in which he claims actual innocence and constitutional violations of his eighth and fourteenth amendment rights thereto, the general rule is that if a petitioner present a substantial allegation of newly discovered evidence, a federal habeas court must grant an evidentiary hearing. *Townsend v. Sain*, 372 U.S. 293, 313, 83 S.Ct. 745, 757 (1963). A petitioner is entitled to an evidentiary hearing when the state court did not provide a full, fair, and adequate hearing. *Id.* However, newly discovered evidence bearing directly upon guilt or innocence is not properly presented in a petition for habeas corpus, unless the petition implicates a constitutional violation. *Shaver v. Ellis*, 255 F.2d 509 (5th Cir. 1958) and *Smith v. Wainwright*, 741 F.2d 1248 (11 Cir. 1984) *reh'g denied, en banc* 747 F.2d 1468, *cert. denied* 470 U.S. 1088 (1985). As already stated, it is important to note that two of Petitioner's affidavits alleging his innocence including the very recent one of the alleged eyewitness have not been presented to the trial court.

This Court realizes that the Petitioner's execution is imminent and feels that, in order to ensure that Petitioner can assert his constitutional claims and out of a sense of fairness and due process, he should be afforded an opportunity to present his constitutional claim of alleged actual innocence along with his evidence including his recently acquired evidence on said issue to the state trial



court and that the state court should be afforded the opportunity to consider said issues.

The Court realizes the state court is normally bound by a "rule of habeas abstention" preventing the state court from considering the merits of a habeas petition when a federal habeas proceeding is pending on the same matters. See *May v. Collins*, 948 F.2d 162, 169, (5th Cir. 1991) *cert. denied* 60 U.S.L.W. 3479 (U.S. 1992). As stated, the Court is also cognizant of the time constraint faced by Petitioner. The Court believes the prudent course here is for this Court to grant the Petitioner's stay of execution request and for this Court to retain jurisdiction of the portion of Petitioner's first claim in which he alleges he is actually innocent and that his execution would violate his eighth and fourteenth amendment rights until noon, February 21, 1992 at which time the Court shall DISMISS said claim without prejudice provided Petitioner shall have filed by then an appropriate application with the state trial court with his constitutional claim of alleged actual innocence along with his recently acquired evidence on said issue. Said DISMISSAL shall be sooner and shall take effect at the time of filing of said state application if same be filed sooner.

In the event that this issue would not be found of sufficient grounds for granting a stay of execution, this Court, as an alternative and independent grounds for granting the stay, would note that Petitioner argues that he has not been provided a full and fair hearing as he alleges is constitutionally required since no evidentiary hearing was provided by the state trial court judge after he submitted some affidavits and this Court would therefore grant a stay pending the Fifth Circuit Court of

Appeals opinion in *May v. Collins*, No. 91-6273 which raises similar issues as when an evidentiary hearing is required where, as here, the evidence is also a claim of actual innocence and affidavits are involved.

CLAIM II

PETITIONER WAS TRIED AND SENTENCED TO DEATH FOR THE MURDER OF TWO POLICE OFFICERS BY A JURY WHOSE MEMBERS INCLUDED A POLICE OFFICER DETECTIVE IN AN OFFICE THAT INVESTIGATED THE CASE, IN VIOLATION OF PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

CLAIM III

DURING TRIAL, RECESSES, AND JUROR DELIBERATIONS, JUROR-POLICE OFFICER BRESSLER WAS ARMED, AND AT LEAST ONE JUROR NOTICED; IN ADDITION, AND CONTRARY TO HIS SWORN STATEMENTS DURING VOIR DIRE, THIS OFFICER *KNEW* ONE OF THE VICTIMS. THESE FACTS REVEAL THAT PETITIONER'S CONVICTION AND DEATH SENTENCE OCCURRED IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

In Claims II and III, which will be discussed together, Petitioner claims his sixth, eighth and fourteenth amendment rights were violated as a result of the service of Brownsville Police Detective Joseph J. Bressler (hereinafter, Bressler) as a juror in his case. Some conclusory statements are made about the service of three other jurors (two of whom were relatives of police officers and another an acquaintance of Rucker) but the two claims are worded on the service of Bressler.



The gist of the Petitioner's complaint as to Bressler's service appears to be centered on mere speculation on the Petitioner's part unsubstantiated by any evidence or law. The Petitioner complains that the service of Bressler created an appearance of unfairness and caused someone to serve who was automatically biased and would believe law enforcement officials and in addition created a constitutionally impermissible risk that a sentence of death would be imposed. In addition, Petitioner presents an affidavit with hearsay evidence that a juror (who has refused to sign an affidavit to that effect) had indicated to an investigator for Petitioner that Bressler was armed during the proceedings and had known Rucker although during voir dire he claimed he did not. (See, Appendix to Petition No. 13). An additional hearsay affidavit has been filed alleging that another juror had stated that Bressler, at the start of jury deliberations, expressed his view that the Petitioner was guilty and had stated facts about Petitioner that were not in evidence and that his views had an influence on her decision. Said juror has also refused to sign such an affidavit and, in fact, when requested to do so, stated that she would not sign such an affidavit as it was not true. (See, Appendix to Petition No. 14).

The Peititioner argues that, although the trial court alleged these claims were procedurally defaulted, the Petitioner properly presented them to the court which ruled on their merits. The Petitioner further asserts these claims implicate a fundamental miscarriage of justice and should not be dismissed before consideration on the merits. This Court finds that Petitioner has not established cause and prejudice under either procedural default or abuse of writ. The Court further finds that

these claims do not implicate a fundamental miscarriage of justice as they do not embrace constitutional violations resulting in the conviction of one actually innocent of the crime or sentence.

The Petitioner's trail counsel moved for a mistrial based, in part, upon Petitioner's dissatisfaction with the selection of Bressler and the other three as jurors. Trial Record, vol. 12, p. 3. However, the trial court in the most recent state habeas petition, specifically found that the Petitioner was procedurally barred from making these claims, as trial counsel made no direct challenge for cause to Bressler but rather simply asked for an additional preemptory challenge. *Ex Parte Herrera*, No. 71, 171, Amended Order of February 14, 1991. The Court of Criminal Appeals found the trial court's conclusions were supported by the record. *Ex parte Herrera*, 819 S.W.2d 528 (Tex. Crim. App. 1991).

The Court similarly finds that the Petitioner has not established cause for failure to raise these claims in his earlier federal petition. Unquestionably, all of the facts surrounding Bressler's selection and service upon which Petitioner now bases his second and third claims, became known during jury selection and as to any which were not Petitioner has not shown cause as to why they were not discovered before the Petitioner filed his first federal habeas Petition in 1985. The same applies as to any complaints about the other three jurors. In short, nothing prevented Petitioner from raising Claims II and III earlier. Petitioner fails to offer any evidence to aid in establishing cause.



The Petitioner seeks to skirt these impediments by asserting Claims II and III are not barred as they involve a fundamental miscarriage of justice. The Court questions whether the Petitioner has even identified a constitutional violation which would lead to the conviction of an innocent person here as required by *McCleskey*. While Petitioner states his sixth, eighth and fourteenth Amendment rights were violated, the Court as previously noted has not been cited anything in law or evidence other than speculation and conclusion that would lead to the conclusion of any constitutional violation.

In addition, Petitioner has not indicated that he has any evidence, hearsay or otherwise, that even if Bressler did carry a gun during his service as a juror, it affected any other juror, nor has he presented other than hearsay any evidence to the effect that Bressler did know Rucker contrary to his own sworn statement during voir dire and that even if he did it affected any juror's decision.

Petitioner, having failed to satisfy the *McCleskey* standard as to Claims II and III, must have said claims dismissed as an abuse of writ.

## CLAIM IV

PETITIONER'S SENTENCER'S WERE PRECLUDED FROM CONSIDERING EVIDENCE WHICH COUNSELED IN FAVOR OF A SENTENCE LESS THAN DEATH, IN VIOLATION OF PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

In this fourth claim for relief, Petitioner asserts, under *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934 (1989)

that: (1) the jury was precluded from considering mitigating circumstances which were in evidence; and, (2) other, available evidence was not presented because of counsel's understanding of the Texas capital sentencing scheme. He argues that had the jury been able to consider this evidence beyond the scope of the two special issues on deliberateness and future dangerousness, it could have imposed a life sentence. Therefore, Petitioner argues, the Texas statute was applied in violation of his sixth, eighth and fourteenth amendment rights. The Respondent argues that raising this issue in this second federal habeas petition as opposed to raising it in the first federal habeas petition in 1985 constitutes abuse of the writ and under Rule 9(b) the claim should be dismissed.

Petition asserts evidence of his military service, his remorse, his mental instability, his substance abuse, his caring family, and police brutality after his arrest is supported by the record. While conceding that this evidence could have been considered under the special issues of the Texas capital sentencing scheme, the Petitioner claims the special issues allowed only an aggravating effect upon future dangerousness.

Petitioner also contends evidence such as psychological evaluations were not pursued because of trial counsel's understanding of the effect to be given mitigating circumstances under the special issues. Petitioner alleges counsel believed any such evidence would only contribute to affirmative answers on the special issues. As a result, counsel did not bring evidence of an abusive father, head injuries, and untreated illnesses to the jury.



The Petitioner has recently secured a psychological evaluation which asserts the Petitioner suffered from neurological impairment and Post Traumatic Stress Disorder (See, Appendix to the Petition No. 9).

As stated previously, *McCleskey* held that Rule 9(b) provides that a second or successive petition for federal habeas relief which raises claims that could have been raised in an earlier federal habeas petition should be dismissed unless the Petitioner can demonstrate both cause for his failure to present the claim in the earlier petition and resulting prejudice. The *McCleskey* Court went on to say that a petition may make a valid cause showing where a particular legal theory was not yet a viable option for the Petitioner.

Petitioner argues that his pre-*Penry* belief that courts had correctly interpreted the Texas capital punishment statute and that presentation of evidence as to the Petitioner's mental incapacities and other alleged mitigating circumstances would only support a "Yes" in response to the special issues presented to the jury for consideration, is cause for the Petitioner's failure to raise this claim earlier.

There is no merit to the Petitioner's argument that his understanding of the law prior to *Penry* explains his failure to make this claim previously in his 1985 federal habeas petition.

The Fifth Circuit in *Cuevas v. Collins*, 932 F.2d 1078, (5th Cir., 1991) found that *Penry* claims have been made since 1980 when the Texas Court of Criminal Appeals found that there was no need for an explanatory jury charge with regard to the consideration of mitigating

evidence during the sentencing phase of a capital murder trial. *Quinones v. State*, 592 S.W.2d 933, 947 (5th Cir. 1980). The Fifth Circuit held,

> [i]n *Selvage v. Lynaugh*, 842 F.2d 89, 94 (5th Cir. 1988), we found that as early as April 1980, a *"Penry"* contention, as it later became known, was "not a recently found legal theory not knowledgeable by competent counsel". . . . There is no basis for asserting that it would have been futile for Cuevas to have pursued his *Penry* claim in his first federal habeas petition. He did so in the federal district court but abandoned the argument on appeal. Nor is the fact that the law is "developing" of aid to Cuevas. The "question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all." *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986).

*Cuevas* at 1082.

Thus, Petitioner's argument that the law in 1985, when Petitioner could have included this claim with his first federal habeas petition, did not provide for a viable *Penry* claim, must fail as Petitioner has failed to show any cause for failure to have raised these issues then.

The Petitioner alternatively argues that to bar his *Penry* claim may give rise to a viable fundamental miscarriage of justice claim. The Court is cognizant that the type of cases where a fundamental miscarriage of justice would apply is in "extraordinary instances where a constitutional violation has caused the conviction of one innocent of a crime." *McCleskey*, at 1470.



The Supreme Court has extended the term "innocent of a crime" to include cases where one would be "innocent" of a death sentence. As the Supreme Court stated in *Dugger v. Adams*, 489 U.S. 401, 109 S.Ct. 1211, 1217 n. 6 (1989):

> In *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 2650, 91 L.Ed.2d 397 (1986), this Court stated that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." We made clear, however, that such a case would be an "extraordinary" one, *ibid.*, and have since recognized the difficulty of translating the concept of "actual" innocence from the guilt phase to the sentencing phase of a capital trial. *Smith v. Murray*, 477 U.S. 527, 537, 106 S.Ct. 2661, 2668, 91 L.Ed.2d 434 (1986). We do not undertake here to define what it means to be "actually innocent" of a death sentence. . . . Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is "actually innocent" of the sentence he or she received.

This Court has faced this issue before in *Bird v. Collins*, in a case where the petitioner was alleging evidence of psychological, sociological and mental condition which he claimed made him innocent of the death sentence and granted a stay pending oral argument on this issue. The Fifth Circuit in *Bird v. Collins*, 943 F.2d 629 (5th Cir. 1991) at p. 630 vacated this Court's decision to stay

the execution pending oral argument and stated as follows:

> The district court hesitated over the expressed uncertainty of the Supreme Court in translating the concept of actual innocence to innocence of a death sentence. The district court quoted from *Smith v. Murray*, 477 U.S. 527, 539, 106 S.Ct. 2661, 2884, 91 L.Ed.2d 434 (1986) that:
>
> > We do not undertake here to define what it means to be "actually innocent" of a death sentence. . . . Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is "actually innocent" of the sentence he or she received. The approach taken by the dissent would turn the case in which an error results in a fundamental miscarriage of justice, the "extraordinary case." [*Murray v. Carrier*, supra. 477 U.S. [478] at 496, 106 S.Ct. [2639], at 2650, [91 L.Ed.2d 397 (1986)], into an all too ordinary one.

We recently acknowledged this uncertainty in *Cuevas v. Collins*, 932 F.2d 1078 (5th Cir. 1991). However we also concluded that whatever may be the "extraordinary" level of *Penry* type evidence not given expression under the question of deliberateness and future dangerousness sufficient to render a petitioner "actually innocent" of a sentence as opposed to error that "might have affected [its] accuracy", it was not presented by *Cuevas*. We reach the same conclusion here.



This Court, therefore, notes that here as in *Bird* whatever the extraordinary level of *Penry* type evidence not given expression under the questions of deliberateness and future dangerousness sufficient to render a Petitioner actually innocent of a sentence as opposed to error that might have affected its accuracy is not present and therefore this claim must be dismissed as an abuse of writ.

## CLAIM V

THE TRIAL JUDGE WRONGFULLY REFUSED TO ALLOW PETITIONER TO SPEAK AT ALL DURING PETITIONER'S TRIAL AND CAPITAL SENTENCING PROCEEDING, THEREBY VIOLATING PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS.

The Petitioner contends he was restrained by the trial court from exercising *any* constitutional rights. The Court, responding to an outburst by Petitioner, instructed him not to disrupt the proceedings or the court would have him placed in an observation room. Petitioner now protests, without any evidentiary support, that this action rendered him effectively mute and unable to participate in his defense.

The Petitioner derives this claim from events readily discernible in the record. As already stated, at one point during voir dire, the Petitioner spoke out, complaining of the proceedings. The trial court ordered that he be placed in the observation room where he could see and hear the proceedings without being disruptive. This transpired before a noon recess. Trial Record, vol. 10, p. 61-63. After

reconvening, with the Petitioner apparently back at counsel's table, the court again cautioned him not to be disruptive or he would return to the observation room. The court noted that it was in the Petitioner's interests to be able to consult with counsel. The Petitioner acknowledged comprehension of the court's warning. Trial Record, vol. 10, p. 66-67. The Petitioner points to no other occasion in which he was removed to the observation room nor where he was prohibited from consulting with counsel.

As stated previously, the Court in *McCleskey* held that Rule 9(b) provides that a second or successive petition for federal habeas relief which raises claims that could have been raised in an earlier federal habeas petition should be dismissed unless the petitioner can demonstrate both cause for his failure to present the claim in the earlier petition and resulting prejudice.[1] The Petitioner directs this Court to nothing that would demonstrate cause for failure to have previously raised this issue. As previously noted, the facts serving as the basis for this claim were clearly ascertainable from the Trial Record. Therefore, Petitioner's only door to relief on this claim hinges on whether this claim implicates a fundamental miscarriage of justice. See *McCleskey* at 1470.

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[1] The Court recognizes that this claim is also procedurally barred. The Texas Court of Criminal Appeals found that the trial court's findings of fact and conclusions of law as to this claim, in which the trial court found error was not preserved, were supported by the record. *Ex Parte Herrera*, 819 S.W.2d 528 (Tex. Crim. App. 1991). The cause and prejudice standard still applies. Petitioner fails to demonstrate cause for failure to preserve error.



The Court finds nothing in this claim implicating a fundamental miscarriage of justice. The Petitioner identifies no constitutional violation in this claim which "probably has caused the conviction of one innocent of the crime." *McCleskey, id.* The Court appreciates an accused's basic right to be present in the courtroom during all stages of a trial under the Sixth Amendment. However, this right does not allow a defendant to disregard proper courtroom decorum nor to disrupt the conduct of trial proceedings. As the Supreme Court stated in *Illinois v. Allen*, 397 U.S. 337, 343; 90 S.Ct. 1057, 1060-1061 (1970) *reh'g denied*, 398 U.S. 915, 90 S.Ct. 1684 (1970).

> Although mindful that courts must indulge every reasonable presumption against loss of constitutional rights, *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

In Petitioner's trial, he was briefly placed in an observation room and allowed to return, enabling him to

participate in his defense. The Petitioner points to nothing which demonstrated a constitutional violation. Therefore, this claim constitutes an abuse of writ and should be dismissed.

REQUEST FOR EX PARTE HEARING FOR EXPERTS AND INVESTIGATORS

Nothing in the Petition indicates the necessity of this Court holding an *ex parte* hearing of the appointment of experts and investigators for Petitioner.

CONCLUSION

For the foregoing reasons the Court is of the opinion that the Respondent's Motion to Dismiss pursuant to Rule 9(b) should be GRANTED as to Petitioner's claims for relief Numbers II, III, IV and V. The Court is further of the opinion that the Respondent's Motion for Summary Judgment as to the portions of Claim Number I, which relies on constitutional *Brady* violations should be GRANTED and that the Court should retain jurisdiction of the remaining portion of Petitioner's Claim Number I in which he alleges he is actually innocent and his execution would violate his eighth and fourteenth amendment rights until noon, February 21, 1992 at which time this Court will DISMISS said claim without prejudice provided Petitioner shall have filed by then the appropriate application with the state trial court with his constitutional claim of alleged actual innocence along with his evidence including his recently acquired evidence on said issue. If same be filed sooner said DISMISSAL shall take effect at the time of filing of said application. In the event



that this issue would not be found of sufficient grounds for granting a stay of execution, this Court, as an alternative and independent grounds for granting the stay, would note that Petitioner argues that he has not been provided a full and fair hearing as he alleges is constitutionally required since no evidentiary hearing was provided by the state trial court judge after he submitted some affidavits and this Court would therefore grant a stay pending the Fifth Circuit Court of Appeals opinion in *May v. Collins*, No. 91-6273 which raises similar issues as to when an evidentiary hearing is required where, as here, the evidence is also a claim of actual innocence and affidavits are involved. The Court is also of the opinion that in order to accomplish this the Motion for Stay of Execution should be GRANTED as per the order of even date herewith.

The Clerk shall send a copy of this Memorandum to counsel for Petitioner and counsel for Respondent.

Done this 17th day of February, 1992 at McAllen, Texas.

/s/ Ricardo H. Hinojosa
Ricardo H. Hinojosa
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

(Caption Omitted In Printing)

ORDER

Came on for consideration the Petitioner's "Motion to Alter and Amend Judgment and for Reconsideration of Orders Entered February 17, 1992" in which the Petitioner requests reconsideration of the Court's previous granting of the Respondent's Motion for Summary Judgment on the part of his first claim for relief which alleged constitional *Brady* violations and the Court being of the opinion that same should be GRANTED and that the Court's previous statements and analysis on said issues in the portion of its previous Memorandum discussing said issues should be withdrawn as the Court is persuaded that there are sufficient factual and legal allegations under the applicable legal standards to necessitate an evidentiary hearing on this matter before this Court.

It is, therefore, ORDERED, ADJUDGED and DECREED that the portion of the Court's previous Order granting Summary Judgment on the Petitioner's first claim alleging *Brady* violations is hereby withdrawn and this cause is set for an evidentiary hearing on the Petitioner's allegations in Claim for Relief Number I on Friday, February 21, 1992, before this Court at 10:00 a.m. in the 9th Floor Courtroom, 1701 West Business Highway 83, McAllen, Texas.

The Clerk shall send a copy of this Order to counsel for Petitioner and to counsel for Respondent.



DONE on this 18th day of February, 1992, at McAllen, Texas.

/s/ Ricardo H. Hinojosa
Ricardo H. Hinojosa
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

(Caption Omitted In Printing)

ORDER SUPPLEMENTING PREVIOUS ORDER STAYING EXECUTION

Petitioner Leonel Torres Herrera was found guilty of capital murder and given a sentence of death by the 197th Judicial District Court of Cameron County, Texas. A Motion for Stay of Execution and a Petition for Writ of Habeas Corpus, pursuant to Title 28 U.S.C. § 2254, was filed with this Court on Sunday, February 16, 1992. Petitioner is scheduled to be executed on Wednesday, February 19, 1992.

The Court by Order of even date herewith having GRANTED the Respondent's Motion to Reconsider its granting of Motion to Summary Judgment on the issue addressed in his First Claim for relief alleging constitutional *Brady* violations by Order of even date herewith and having set an evidentiary hearing on said issues for Friday, February 21, 1992 at 10:00 a.m. before this Court hereby GRANTS A Stay of Execution pending the resolution of said issues by this Court.

The Court has considered the applicable legal standard enunciated in *Selvage v. Lynaugh*, 842 F.2d 89 (5th Cir. 1988) with regards to this claim in granting a stay as follows:

> (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest. *O'Bryan v. McKaskle*, 729 F.2d 991, 993 (5th Cir. 1984); *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982), cert. denied, 465 U.S. 1013, 104 S.Ct. 1015, 79 L.Ed.2d 245 (1984); *Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982).



> *In a capital case "while the movant need not always show a probability of success on the merits, he must present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities [i.e. the other three factors] weighs heavily in the favor of granting the stay."* *O'Bryan v. McKaskle*, 729 F.2d at 993 (quoting *Ruiz v. Estelle*, 666 F.2d at 856).
>
> *Colestine v. Butler*, 823 F.2d 74, 77 (5th Cir. 1987), cert. denied, ___ U.S. ___, 108 S.Ct. 6, 97 L.Ed.2d 796 (1987); see also *Streetman v. Lynbaugh*, 835 F.2d 1521, 1524 (5th Cir. 1988) (emphasis added).

The Court finds that a stay in this case is appropriate. It is THEREFORE,

ORDERED, ADJUDGED and DECREED that Petitioner's Motion for Stay of Execution be hereby GRANTED and that Petitioner's execution shall be STAYED pending resolution by this Court of Petitioner's First Claim.

The Court notes that a previous Order granting a Stay of Execution was granted by this Court on February 17, 1992 and the reasons stated in the granting of this Stay of Execution are in addition to and independent to the reasons stated in said Order and shall supplement said Order.

It is further ordered that the Clerk shall give immediate telephonic and telegraphic notice to James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, to the Honorable Ann Richards, Governor of the State of Texas; and to the Honorable Dan Morales, Attorney General of the State of Texas that Leonel Torres Herrera's execution is stayed by order of this Court. A certified copy of this Order shall be subsequently served upon these persons by the United States Marshal.

The Clerk shall send a copy of this Order to counsel for Petitioner and counsel for Respondent.

Done this 18th day of February, 1992, at McAllen, Texas.

/s/ Ricardo H. Hinojosa
Ricardo H. Hinojosa
UNITED STATES DISTRICT JUDGE

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UNITED STATES COURT OF APPEALS
for the Fifth Circuit

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No. 92-2114

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LEONEL TORRES HERRERA,

Petitioner-Appellee,

VERSUS

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent-Appellant.

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Appeal from the United States District Court
for the Southern District of Texas

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Before KING, DAVIS and JONES, Circuit Judges.

DAVIS, Circuit Judge:

James A. Collins, Director, Texas Department of Criminal Justice, appeals the district court's order staying the execution of Leonel Torres Herrera. Herrera's execution is scheduled for February 19, 1992, between midnight and dawn.

I.

The district court's thorough memorandum opinion and order of February 17 outlines in detail the critical steps which have been taken in this case. In summary, Herrera was sentenced to death on January 21, 1982,

following his conviction for capital murder. The Texas Court of Criminal Appeals affirmed Petitioner's conviction and death sentence, **Herrera v. State,** 682 S.W.2d 313 (Tex. Crim. App. 1984) (en banc). The United States Supreme Court denied certiorari, **Herrera v. Texas,** 471 U.S. 1131 (1985). Petitioner filed a petition for writ of habeas corpus in the 197th District Court of Cameron County, Texas. The convicting court recommended that relief be denied and in August 1985, the Texas Court of Criminal Appeals denied relief. **Ex parte Herrera,** Application # 12,848-02-Texas Criminal Appeals 1985. Thereafter, on August 7, 1985, Herrera filed his first federal petition for habeas corpus, and the district court stayed Herrera's scheduled execution. In October 1989, the federal district court rejected Herrera's habeas petition and dissolved the stay of execution. Herrera appealed that judgment to this court. On June 25, 1990, we affirmed the district court judgment and vacated Herrera's stay of execution, **Herrera v. Collins,** 904 F.2d 944 (5th Cir. 1990). The Supreme Court denied certiorari, **Herrera v. Collins,** ___ U.S. ___, 111 S.Ct. 307 (1990).

Herrera filed his second application for state writ of habeas corpus on December 12, 1990. On January 14, 1991, the trial court withdrew an earlier order, entered findings of fact and conclusions of law, and denied habeas relief. The Court of Criminal Appeals denied relief on May 29, 1991, on the basis of the trial court's finding and conclusions and vacated a stay of execution.

On December 17, 1991, Herrera filed a petition for writ of certiorari in the United States Supreme Court, which is still pending. Herrera filed the instant application for federal writ of habeas corpus in the district court



on February 16, 1992, raising five claims for relief.[1] The claims that Herrera asserts in his present petition are not duplicative of the claims he asserted in his first petition.

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[1] Herrera raises the following claims in the instant habeas petition:

> 1. The State's failure to reveal exculpatory evidence resulted in the conviction and sentence of an innocent person, in violation of the Sixth, Eighth, and Fourteenth Amendments. Petitioner is innocent, another person has confessed to the crime, and the Petitioner's execution would violate the Eighth and Fourteenth Amendments.
>
> 2. Petitioner was tried and sentenced to death for the murder of two police officers by a jury whose members included a police officer detective in an office that investigated the case, in violation of the Petitioner's Sixth, Eighth, and Fourteenth Amendment rights.
>
> 3. During trial, recesses, and juror deliberations, juror-police officer Bressler was armed, and at least one juror noticed; in addition, and contrary to his sworn statements during voir dire, this officer knew one of the victims. These facts reveal that Petitioner's conviction and death sentence occurred in violation of his Sixth, Eighth, and Fourteenth Amendment rights.
>
> 4. Petitioner's sentencers were precluded from considering evidence which counseled in favor of a sentence less than death, in violation of Petitioner's Sixth, Eighth, and Fourteenth Amendment rights.
>
> 5. The trial judge wrongfully refused to allow Petitioner to speak at all during Petitioner's trial and capital sentencing proceeding, thereby violating Petitioner's federal Constitutional rights.

The district court denied all relief on claims 2,3,4 and 5 on grounds of writ abuse. The court initially denied petitioner's **Brady** claim, (which was included as part of his first claim) on grounds that insufficient facts were presented to support this claim. On reconsideration, the district court, however, concluded that sufficient facts were presented to require a hearing which he scheduled for February 21, 1992. The district court granted a stay of execution pending that hearing. The district court also granted petitioner's motion for a stay of execution to permit petitioner to further litigate in state court the second prong of his first claim – actual innocence. Alternatively, the court granted a stay pending rendition of an opinion by this court in **May v. Collins,** No. 91-6273. The district court also signed a Rule 54(b) judgment dismissing claims 2-5 and issued a certificate of probable cause as to these claims. Collins filed an appeal from the district court's order granting a stay of execution and moved this court for an order vacating the stay of execution.

II.

For reasons stated by the district court, it correctly rejected petitioner's claims 2, 3, 4 and 5 because the petitioner has clearly abused the writ as to those claims. **See McCleskey v. Zant,** ___ U.S. ___, 111 S.Ct. 1454 (1991).

On the **Brady** prong of petitioner's first claim, we agree with the district court's initial conclusion that petitioner neither proffered evidence nor alleged particularized facts that demonstrate that the state withheld any favorable evidence from Herrera before his trial. As



stated above, the district court, on reconsideration, concluded that the pleadings and affidavits were sufficient to require a hearing on one issue: whether the state knew that petitioner was innocent of the murder of Officer Carrisalez and withheld that information from Herrera before his trial. We are not persuaded that Herrara's petition as amplified by his exhibits state specific facts that "point to real possibility of constitutional error." **Blackledge v. Allison,** 431 U.S. 63, 75 n. 7, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977).

Herrera never identifies any specific evidence that he contends was withheld by the prosecutor before trial. Instead, he relies on affidavits and newspaper clippings to suggest that the prosecutor knew that Raul Herrera, rather than Leonel Herrera, committed the murders. Nothing in any of the exhibits suggests, however, that the prosecutor could have known of the information contained within them at the time of Herrera's trial.

The newspaper clippings upon which Herrera relies make no reference at all to the instant case and do not refer to police corruption in connection with drug acitivity in South Texas prior to 1985 – three years after Herrera's trial; further, they contain nothing to suggest that anyone who testified at his trial or any officials in Cameron County, where Herrera was convicted, have ever been involved in any wrongdoing. The affidavit of Raul Herrera, Jr., states that he told a police officer that this father committed the murders rather than Petitioner, but he does not say when or to whom this information was conveyed. Consequently, Herrera has not pled with sufficient particularity the elements of his **Brady** claim to require a hearing. **Id.**

Moreover, the exculpatory evidence on which Herrera relies is a claim that someone else, and not he, committed the offenses of which he was convicted. The person at whom he points the finger is his brother, Raul, now deceased. Particularly in light of the fact that his brother allegedly committed the offense in the car which Petitioner normally drove, this information clearly was not only available to the defense, but was likely more available to the defense than it was to the prosecution. "**Brady** does not oblige the government to provide the defendants with evidence that they could obtain from other sources by exercising reasonable diligence." **United States v. McKenzie,** 768 F.2d 602, 608 (5th Cir. 1985) (citation omitted), **cert. denied,** 474 U.S. 1086, 106 S.Ct. 861 (1986). "When evidence is available equally to the defense and the prosecution, the defendants must bear the responsibility for their failure to diligently seek its discovery." **Id., citing United States v. Milstead,** 671 F.2d 950, 953 (5th Cir. 1982). Herrera's attempt to couch this claim in terms of a **Brady** violation therefore is disingenuous.

We therefore turn to the second turn to the second issue which the district court concluded required it to grant a stay of execution. As a part of his first claim, Herrera contended that he was actually innocent of Carrisalez's murder. Herrera filed a substantially identical claim in the state habeas court. In support of his state habeas claim Herrera attached two affidavits. First, he attached the affidavit of attorney Hector J. Villareal, who had represented petitioner's brother, Raul Herrera, on a charge of attempted murder. Villareal asserted that Raul



Herrera confessed to him that Raul, not petitioner, murdered both Rucker and Carrisalez. Herrera also submitted the affidavit of Franco Palacios, one of his brother Raul's cell mates. Palacios stated that Raul confessed to him that Raul had murdered Rucker and Carrisalez.

When Herrera filed his federal habeas petition, he attached two additional affidavits. The most significant affidavit he attached is the affidavit of his nephew, Raul Herrera, Jr., the son of Raul Herrera. Raul Herrera, Jr. stated that he was with his father on the date of the murders and that he saw his father kill both Rucker and Carrisalez. According to Raul Herrera, Jr., the petitioner was not present when the murders occurred. Raul, Jr. also stated that he told a police officer what occurred but the officer told him never to repeat it. Raul, Jr. did not suggest when this conversation occurred. Raul, Jr. states that no attorney representing the petitioner had ever asked him about the events until recently. His affidavit is dated about two weeks ago, January 29, 1992. Petitioner also included the affidavit of an old schoolmate of the Herrera brothers, who related that Raul, Sr. made a confession to him similar to the one attorney Villareal asserted that Raul had made.

In his federal habeas petition, Herrera asserted that he was entitled to a hearing on his actual innocence claim, particularly in light of Raul Herrera, Jr.'s affidavit. The district court concluded that petitioner should have an opportunity to present the affidavit of the alleged eye witness, Raul Herrera, Jr. The district court then granted the petitioner's stay of execution and retained jurisdiction of the petitioner's "actual innocence" claim until noon, February 21, 1992. The district court directed that it

would dismiss that claim without prejudice on February 21, 1992, provided petitioner had filed a successive state habeas petition so that he could present the additional evidence to that court.

We begin our analysis of the propriety of the district court's stay with the recent admonition of the Supreme Court: "A stay of execution pending disposition of a second or successive federal habeas petition should be granted only when there are 'substantial grounds upon which relief may be granted.' " **Delo v. Stokes,** 495 U.S. 320, 109 L.Ed.2d 325, 328, 110 S.Ct. 1880, 1881 (1990), (quoting **Barefoot v. Estelle,** 463 U. S. 880, 895, 103 S.Ct. 3383, 3396 (1983)). This court has held that a court should consider four factors in deciding whether to grant a stay of execution:

> (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing or irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest.

**Byrne v. Roemer,** 847 F.2d 1130, 1133 (5th Cir. 1988) (quoting **Streetman v. Lynaugh,** 835 F.2d 1521, 1524 (5th Cir. 1988)). Although in a non-abuse context the movant in a capital case "need not always show a probability of success on the merits, he must present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities [i.e., the other three factors] weighs heavily in the favor of granting the stay.' " **Celestine v. Butler,** 823 F.2d 74, 77 (5th Cir.) (quoting **O'Bryan v. McKaskle,** 729 F.2d 991, 993 (5th Cir. 1982), **cert. denied,** 483 U.S. 1036, 108 S.Ct. 6 (1987). However, the Supreme Court's recent decision in **Delo v. Stokes,** 495 U.S. at 320, 110 S.Ct. at 1880, makes it clear that, in a case involving a second or subsequent petition, the latter three factors cannot weigh in favor of a stay in the absence of substantial legal claims upon which relief may be granted.



Herrera's claim of "actual innocence" presents no such substantial claim for relief. The rule is well established that claims of newly discovered evidence, casting doubt on the petitioner's guilt, are not cognizable in federal habeas corpus, **see Townsend v. Sain,** 372 U.S. 293, 317, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). Texas has adopted a similar rule. **See Ex parte Binder,** 660 S.W.2d 103, 104-106 (Tex. Crim. App. 1983). Moreover, the right to collaterally attack a conviction is not a right guaranteed by the Constitution. **Pennsylvania v. Finley,** 481 U.S. 551, 107 S.Ct. 1990, 1994 (1987).

In **Townsend v. Sain,** 372 U.S. 293 (1963), the Court held that a federal habeas court must grant an evidentiary hearing on an allegation of newly discovered evidence only when the evidence "bear[s] upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." 372 U.S. 293 (1963). We have recognized the above statement as the Court's holding in at least two cases, **Armstead v. Maggio,** 720 F.2d 894, 896 (5th Cir. 1983) (per curiam), and **Boyd v. Puckett,** 905 F.2d 895, 896 (5th Cir. 1990), **cert. denied,** 112 L.Ed.2d 337, 111 S.Ct. 526 (1990).

Thus, once **Herrara's Brady** claim is rejected, Herrera's "actual innocence" claim does not allege a ground upon which habeas relief can be granted. Under Texas law, a claim of innocence based on newly discovered evidence is grounds for a new trial but such a claim will not support collateral review. **See, e.g. Ex parte Binder,** 660 S.W.2d 103, 105-06 (Tex. Crim. App. 1983) (en banc). Herrera, therefore, has presented no claim for collateral relief under Texas law. Consequently, we can find no legal justification to permit him to present, in piecemeal fashion, additional affidavits to the state court. We conclude that the district court erred in granting a stay of execution for this purpose.

**May v. Collins** relied upon as an alternate ground for a stay, is inapposite. The question in **May** concerns whether a finding of fact by a state habeas court, based upon affidavits alone, is entitled to the presumption of correctness. But the facts at issue in **May** implicated a constitutional defect in **May's** conviction. No such question is presented in this case.

III.

CERTIFICATE OF PROBABLE CAUSE

The district court issue a certificate of probable cause (CPC) with respect to claims 2-5, although it rejected any relief on these claims. This certificate implies that the district court found that petitioner had made a substantial showing of the denial of a federal right with respect to these claims. **Barefoot v. Estelle,** 463 U.S. 880 (1983). Ordinarily a stay of execution accompanies such a finding



and we are uncertain whether the district court inadvertently failed to grant a stay on these claims. Because of the ambiguity of the grant of CPC on claims 2-5 and the failure to grant a stay, the press of time requires us to address the propriety of the district court's issuance of CPC.

For reasons stated by the district court, we fully agree that claims 2, 3, 4, and 5 are barred because petitioner abused the writ. We find no substantial grounds upon which relief might be granted on these claims. Accordingly, we vacate the certificate of probable cause as improvidently granted. **See Cuevas v. Collins,** 932 F.2d 1078, 1082 (5th Cir. 1991).

MOTION TO VACATE STAY

In sum, on claim 1, we conclude that Herrera has failed to present a substantial ground upon which relief might be granted. **See Delo v. Stokes,** 110 S.Ct. 1880, 1881 (1990). As we stated above, the petitioner failed to allege sufficiently particularized facts to entitle petitioner to relief on his **Brady** claim. The "actual innocence" claim standing alone does not state a claim upon which habeas relief can be granted by either a federal habeas court or a Texas habeas court. We therefore find no legal justification to stay the execution to allow petitioner to litigate further in state court. Accordingly, we grant Collins's motion to vacate the stay of execution entered by the district court.

**Supreme Court of the United States**

*No.* 91-7328

Leonel T. Herrera,,

Petitioner

v.

James A. Collins, Director,
Texas Department of Criminal
Justice, Institutional Division

On Petition for Writ of Certiorari to the United States Court Court of Appeals for the Fifth Circuit.

On Consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

February 19, 1992